Supreme Court, U.S.
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No. 96-995

In The

Supreme Court of the United States

October Term, 1996

CHANCE MANAGEMENT, INC., a South Dakota corporation, and WILLIAM A. SANDERS, a Wyoming resident,

Petitioners,

v.

STATE OF SOUTH DAKOTA, et al,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTIONS PRESENTED

1. Is a discriminatory residency requirement saved by the market participation exception to Commerce Clause scrutiny where the State has a monopoly in the relevant market, governs the relevant market by comprehensive statutes and regulations, requires licenses of all participants and does not act as a buyer, seller or employer?

2. Does a nonresident shareholder whose corporation is denied a government license because of his nonresident status have standing to challenge the discrimination under the Privileges and Immunity Clause in Article IV, §2 of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings are:

Respondents: State of South Dakota: Mark W. Barnett, in his official capacity as Attorney General of South Dakota: The South Dakota Lottery; Susan Walker, in her official capacity as Executive Director of the South Dakota Lottery: and H. I. King, Beverly McCracken, Elaine Emery, Don Bender, Burdette Solum and John E. Carmody, Sr., in their official capacities as members of the South Dakota Lottery Commission.

Petitioners: Chance Management, Inc., a South Dakota corporation, and William A. Sanders, a Wyoming resident.

Note: Chance Management, Inc. has no subsidiaries or parent companies.

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STATEMENT OF THE CASE

Petitioners Chance Management, Inc., and William Sanders filed a lawsuit against Respondents, State of South Dakota, its Attorney General and the former Executive Director of the South Dakota Lottery and members of the South Dakota Lottery Commission challenging the South Dakota video lottery residency requirement on various constitutional grounds. The matter was submitted to the District Court for the District of South Dakota Central Division, which concluded with the granting of Respondents' motion for summary judgment and dismissal of the action. The written opinion is found at 871 F.Supp. 209 (App. B).[1] The United States Court of Appeals for the Eighth Circuit affirmed the district court in a written opinion found at 97 F.3d 1107 (App. A). Both the District Court's and the Court of Appeals' opinions contain the undisputed facts relevant to this Petition which, for the sake of brevity, will be incorporated by reference. App. A 2a-6a, 18a-19a; App. B 40a-41a, 43a-44a.

In order to provide the Court with a full picture, however, Respondents highlight the following facts. The video lottery business is owned and operated by the State of South Dakota and is but one of the several forms of gambling which are legal in South Dakota under state and federal law. In addition, though South Dakota was the first state to enter into the gaming market through a video lottery enterprise, other states have since started similar businesses. South Dakota made a substantial

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[1] The term "App." refers to the Appendix filed as part of the Petition for Writ of Certiorari.

investment in its video lottery business through a central computer system, computer software, personnel, and equipment.

South Dakota imparts direction to the video lottery business in great detail through statutes and regulations. *See* SDCL ch. 42.7A and S.D. Admin. Rules, Title 48. Through these provisions, South Dakota established the parameters of the major business relationships into which it may enter in the conduct of video lottery. The business relationships addressed are South Dakota's business partners or co-venturers: the video lottery machine manufacturers, the operators which service and place video lottery machines, and the business establishments in which the video lottery machines are located. The video lottery operator is the most important of the business partners for the success of the video lottery enterprise. App. B 46a.

The major enforcement tool utilized to insure that these private participants in the video lottery business comply with South Dakota's provisions is cessation of a business's ability to participate in the video lottery enterprise. The traditional governmental enforcement tool of criminal sanctions is *not* utilized to enforce the business relationship.

REASONS FOR DENYING THE PETITION

Petitioners' arguments for granting the Petition are deficient.

SUMMARY

The Court of Appeals in its decision below applied the Market Participation Doctrine to the Commerce Clause consistent with this Court's prior decisions. Petitioners seek an unsupported narrowing of this doctrine and a newfangled antitrust exception, both of which are unwarranted under this Court's prior decisions. The Court of Appeals' decision below not only properly applied the precedent established by this Court, but also supplied the specific facts to support its conclusion that South Dakota was a participant in the gaming market, not a regulator, and as such, the Commerce Clause is inapplicable.

The Court of Appeals in its opinion below also properly determined that an individual shareholder could not raise a Privileges and Immunities Clause claim regarding a corporate residency requirement where such a claim is unavailable under the Constitution to the corporation itself. Petitioners' attempt to expand this Clause's application to corporations is lacking any meritorious legal underpinnings.

A. Antitrust analysis has no applicability to the application of the Market Participant Doctrine to Commerce Clause challenges.

Petitioners seek to burden the Market Participant Doctrine as established by this Court with unsupportable distinctions and antitrust considerations. This argument, which is expounded in the dissent to the Court of Appeals' decision below, is not consistent with the established precedent of this Court and, if sustained, would

place an unwarranted burden on a state's ability to become involved in private business enterprises.

The Commerce Clause, Article I, Section 8, of the United States Constitution, only withholds from a state the power to "regulate Commerce . . . among the several States." Thus, the threshold inquiry in Commerce Clause analysis is to determine if a state is regulating commerce. This Court, through a series of decisions, has distinguished between state "regulation" versus state "participation" in a market. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). This Court has held that when a state is acting as a market participant, the state is free from the strictures of the Commerce Clause. This Court's decisions " . . . stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. . . . [I]n this kind of case, there is 'a single inquiry: whether the challenged program constituted direct state participation in the market.' " *White v. Massachusetts Council of Construction Employers*, 460 U.S. at 208, quoting *Reeves, Inc. v. State*, 447 U.S. at 436, n.7.

The Court of Appeals in its opinion below applied this Court's established precedent regarding the Market Participant Doctrine to the facts involving South Dakota's video lottery enterprise. The facts on which the Court of Appeals (App. A 8a) reached its conclusion include:

1. South Dakota created a business within the existing gaming market;
2. South Dakota invested substantial sums of money to get the South Dakota lottery off the ground;
3. The State owns the dominant software programs that operate the video lottery machines and owns the computer system that controls the machine payouts;
4. South Dakota presently reaps fifty percent of the revenues generated by the South Dakota lottery.

The Court of Appeals properly concluded, consistent with court precedent, that South Dakota is a market participant rather than a regulator, and that South Dakota has the right to select the parties with whom it will deal as partners or members in this joint venture gaming enterprise. App. A 8a-9a.

Petitioners do *not* dispute South Dakota's market participation in the video lottery business, but rather argue that such participation does not merit application of the Market Participant Doctrine. Petitioners assert that due to South Dakota's dominant position in the video lottery business and the fact that the State's market participation is not as a buyer, seller, or employer, the Commerce Clause should apply. This argument is woefully lacking support in this Court's prior decisions. This Court, as correctly noted by the Court of Appeals, has not limited the Market Participant Doctrine to the unique factual contexts of its prior decisions. This lack of legal support was the basis for the Court of Appeals' decision below in rejecting this argument. App. A 9a-10a.

The Circuit Court of Appeals correctly determined that the Market Participant Doctrine encompassed South Dakota's choice of business partners. The Court of Appeals properly concluded that this Court's inquiry for application of the Market Participant Doctrine " . . . asks not whether the state is acting as a buyer, seller, or employer when it participates in the market, but whether the state is actually participating in a narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants." [Citations omitted.] App. A 9a. This conclusion was similarly reached by the Second Circuit in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2nd Cir. 1995) *cert. denied.* 116 S.Ct. 911: "To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals – just as if it were a private party." Petitioners have cited no decision of this Court or of any Court of Appeals that conflicts with the determinations of the Court of Appeals in the decision below or with the Second Circuit in *SSC Corp.*

Relying upon the dissenting opinion in the Circuit Court of Appeals' decision below, Petitioners bootstrap this argument by asserting that since South Dakota has a dominant position in the video lottery business enterprise, it should be treated as a market regulator rather than a market participant.[2] The decisions relied upon by

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[2] This argument is factually inaccurate since it presumes video lottery is the "market" rather than a business enterprise The market South Dakota participates in is the gaming market. To conclude South Dakota has a monopoly in the video lottery

both Petitioners and the dissent are at best marginal, since upon review the references to monopoly are dicta unsupported by prior decisions of this Court. Neither the decision in *Western Oil and Gas Association v. Cory*, 726 F.2d 1340 (9th Cir. 1984), affirmed without opinion by an equally divided court, 471 U.S. 81 (1985), or *Big Country Foods, Inc. v. Board of Education*, 952 F.2d 1173 (9th Cir. 1992). analytically address the applicability of antitrust, market power, or monopoly analysis to the Market Participant Doctrine. The references by the Ninth Circuit to monopolies is dicta and not essential to the holdings in either decision.

In contrast, the creation of a monopoly exception to the Market Participant Doctrine has been rejected not only by the Court of Appeals in the opinion below, but also other lower court decisions. *See, e.g., Lafrancois v. State of Rhode Island*, 669 F.Supp. 1204 (D.R.I. 1987). The Second Circuit in *SSC Corp. v. Town of Smithtown* emphasized that application of antitrust analysis to the Market Participant Doctrine was misplaced, concluding " . . . the logic of this argument escapes us." *Id.*; 66 F.3d at 517. Finally, Petitioners' monopoly argument is comparable to the market exploitation, protectionist, and free market

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market is inanely similar to concluding that McDonalds has a monopoly in the McDonalds' franchise market. Other participants in the South Dakota gaming market include businesses which conduct: parimutuel wagering on horses and dogs; limited card games and slot machines; charitable bingo and lotteries; and various forms of gaming engaged in by eight Indian tribes. (*see generally*, Indian Gaming Regulatory Act, 28 U.S.C. §§ 2701-2710). This does not include the numerous businesses that operate gaming enterprises in other states.

forces arguments rejected by this Court in *Reeves, Inc. v. Stake*, 477 U.S. at 442-446.

As properly analyzed in the Court of Appeals' decision below, the application of the Market Participant Doctrine is limited to the inquiry of whether South Dakota is acting as a market participant or regulator. This inquiry necessarily deals with the nature of the activity the governmental entity is performing, not its quantity or quality. The exceptions to the Market Participant Doctrine as pronounced by this Court have been properly limited to circumstances where the business involved is a traditional government activity, or where the government entity uses its participation in a market to justify market regulation beyond its participation in a proprietary capacity. Neither of these exceptions exist in this case. As the Court of Appeals correctly concluded in the decision below, South Dakota participates in the gaming market and it deals solely with those entities with which it directly participates in the video lottery business. App. A 12a. Limiting the types of participation covered by the Market Participation Doctrine or excepting from its application, market participation based upon antitrust analysis are simply inappropriate.

B. Petitioners' argument regarding shareholder standing is contrary to well-established Court precedent and does not involve a conflict among the circuits.

Petitioners, in their second question presented, attempt to seek this Court's review of a novel, but legally meritless issue of law. Contrary to Petitioners' argument, there is controlling precedent from this Court and, upon

review of the decisions cited, no conflict exists among the circuits.

The controlling precedent of this Court is that the protection provided under the Privileges and Immunities Clause, Article IV, Section 2 of the United States Constitution is not afforded to corporations since these business entities are not considered citizens. *Western and Southern Life Insurance Co. v. Board of Equalization,* 451 U.S. 648 (1981); *Hemphill v. Orloff,* 277 U.S. 537 (1928). Petitioners attempt to undermine this well-founded and long-established precedent by asserting that although the corporation may not assert the protection afforded by the Privileges and Immunities Clause, a shareholder of the corporation can bring such a claim to contest state restrictions regarding the corporate entity. To allow Petitioner Sanders standing to assert a Privileges and Immunities Clause claim which Petitioner Chance Management is precluded from pursuing, will have the practical effect of nullifying this Court's prior determinations.

The issue is not, as contended by Petitioner, the mere establishment of a "variant" from the customary standard of review of shareholder standing; rather, it is an unwarranted attempt to extend a constitutional right personal to *citizens,* to artificial entities which citizens create for their economic convenience.

Respondents are also unable to discern a true conflict among the circuits. Petitioners argue that there is a conflict among the circuits regarding a shareholder's ability to challenge a corporate residency restriction under a Privileges and Immunities Clause claim. *Cooper v. McBeath,* 11 F.3d 547 (5th Cir. 1994) is cited as a circuit

that upheld this position, while *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994) is cited as a circuit that rejected this argument, in addition to the Eighth Circuit Court of Appeals, decision below. Petitioners' reliance upon *Cooper v. McBeath*, is misplaced. This Fifth Circuit Court of Appeals' decision does not address shareholder standing under the Privileges and Immunities Clause.

There simply is no decision Petitioners have cited that supports their contention that there is a conflict among the circuits involving their novel question of law. Indeed, the Seventh Circuit in *J.F. Shea Co., Inc. v. City of Chicago*, 992 F.2d 745 (7th Cir. 1993) decided under analysis identical to that followed by the Fourth and Eighth Circuits, that an employee of a corporation did not have standing to assert a Privileges and Immunities Clause claim alleging wrongs to the corporate employer.

Absent Petitioners' ability to cite a lower court decision that demonstrates a conflict among the circuits or that the decision below is incorrect, this Court should decline to hear the question regarding shareholder standing to pursue a Privileges and Immunities Clause claim.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

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